LIBRARY
SUPREME COURT, U. S.

FILED
JAN 13 1975
MICHAEL RODAK, JR., CLERK

In The

# SUPREME COURT OF THE UNITED STATES

October Term, 1974

No.------ 74-750

JACK F. DAVIS, Director, Department of Corrections (Formerly James F. Howard, Director, Division of Corrections) and K. R. PURVIS, Superintendent, Southampton Farm,

*Petitioners,*

v.

NELSON JAMES LEWIS,

*Respondent,*

## BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE JUDGEMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

L. B. CHANDLER, JR.
*Chandler and Huff*

415 Park Street
Charlottesville, Virginia 22901

## TABLE OF CONTENTS


| | Page |
|---|---|
| PRELIMINARY STATEMENT | 1 |
| STATEMENT OF THE CASE | 2 |
| ARGUMENT: | |
| I. The Fifth Amendment Protection Against Being Placed Twice In Jeopardy Of Life And Limb For The Same Offense Applies Through The Fourteenth Amendment To State Juvenile Court Proceedings | 6 |
| II. The Respondent, Nelson James Lewis, Having Exhausted The Remedies Available To Him In The State Courts Of Virginia Was Properly Awarded A Writ Of Habeas Corpus From The United States District Court For The Western District Of Virginia | 6 |
| CONCLUSION | 7 |
| CERTIFICATE OF SERVICE | 7 |

## TABLE OF CITATIONS


| Cases | *Page* |
|---|---|
| Anonymous v. Superior Court of Pima, 10 Ariz. App. 253 457 P 2d 956 (1959) | 4 |
| Ashe v. Swenson, 397 U. S. 436 (1970) | 4 |
| Benton v. Maryland, 395 U. S. 784 (1969) | 4 |
| Collins v. State 429 S W 2d 650 (1968) | 4 |
| Ex Parte Lange 18 Wall (85 U. S.) 103 (1874) | 4 |
| Fain v. Duff, 488 F2d 218 (5th Cir. 1973) | 4, 5 |
| Greene v. United States, 355 U. S. 184 (1957) | 4 |
| Howard v. Lewis, Case No. 74-1568 (4th Cir. 1974) | 5 |
| In Re Gault, 387 U. S. 1 (1967) | 4, 5 |
| In Re Winship 397 U. S. 358 (1970) | 5 |
| Jones v. Breed, 497 F 2d 1160 (9th Cir. 1974) | 4, 5 |
| Richard M. v. Superior Court Of Shasta County, 4 Cal. 3rd 370, 482 P. 2d 664 (1971) | 4 |
| Rouzie v. Commonwealth 215 Va. 174 (1974) | 3 |
| State v. Gibbs, 94 Ida. 108, 500 P 2d 209 (1972) | 4 |
| Tennessee v. Jackson, 503 S. W. 2d 185 (1973) | 4, 5 |
| Tolliver v. Judges of Family Court, 298 N. Y. S. 2d 237 (1969) | 4 |
| United States v. Jorn, 400 U. S. 470 (1971) | 4 |

**Constitutions and Statutes**

United States Constitution, Amendment V ..... 5

United States Constitution, Amendment XIV ..... 6

28 United Stated Code Section 2241 ..... 6

28 United States Code Section 2254 ..... 6

**Other Authorities**

Sigler, "A History of Double Jeopardy". 7 *Amer. Jour.* Legal History 283 (1963) ..... 4

In The

# SUPREME COURT OF THE UNITED STATES

October Term, 1974

---

No.--------

---

JACK F. DAVIS, Director, Department of Corrections (Formerly James F. Howard, Director, Division of Corrections) and K. R. PURVIS, Superintendent, Southampton Farm,

*Petitioners,*

v.

NELSON JAMES LEWIS,

*Respondent,*

## BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE JUDGEMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

### PRELIMINARY STATEMENT

Nelson James Lewis, the Respondent, prays that the petition for a Writ of Certiorari to the judgement of the United States Court Of Appeals for the Fourth Circuit entered on November 4, 1974, in the case styled Nelson James Lewis v. James F. Howard, Director and K. R. Purvis, Superintendent, Southampton Farm, be denied.

## STATEMENT OF THE CASE

The respondent, Nelson James Lewis, adopts the statement of the case as set out in the petitioners statement of the case. However, the respondent wishes to point out to the Court, that on June 9, 1972 at the adjudicatory hearing in the Eighth Regional Juvenile and Domestic Relations Court in the City of Charlottesville, Virginia, the Judge of that Court, after hearing evidence on the merits of the case, did enter a finding of "true" on all three petitions.

## ARGUMENT

### I.

### The Fifth Amendment Protection Against Being Placed Twice In Jeopardy Of Life Or Limb For The Same Offense Applies Through The Fourteenth Amendment To State Juvenile Court Proceedings.

The Commonwealth in its petition attempts to characterize the proceedings in the juvenile court within the context of a waiver hearing, and states that "The action of the juvenile court was roughly analagous to the action of a judge of a Court not of record holding a preliminary hearing in a criminal case and dismissing the charge". (Commonwealth's petition, page 24) However, the Honorable District Court Judge in his opinion recognized that the proceedings were much more than a mere waiver proceeding, and that the petitions against Nelson James Lewis were adjudicated to be true, and that he was committed to the State Department of Welfare and Institutions.

It is submitted that once the juvenile court judge entered the adjudicatory stages of the proceedings, and having heard the case on its merits found the petitions to be true, that at this point jeopardy attached. A finding of true within the Juvenile Court System in Virginia is for all practical purposes akin to a

finding of guilty by a court trying an adult for any given offense.

In attempting to equate a court not of record dismissing a felony charge with a juvenile court's decision to retain jurisdiction and dispose of the case on its merits, the Commonwealth has not taken into account one serious difference in the two proceedings. A court not of record conducting a preliminary hearing in Virginia on an adult felony charge is not hearing the case on its merits which would result in a finding of guilty or not guilty. Its sole purpose is to determine whether the Commonwealth has proved probable cause to have the case certified to a grand jury.

Until recently, the Virginia Supreme Court had consistently held that jeopardy does not attach in such a proceeding because the court not of record lacks the jurisdiction to adjudicate a felony charge on its merits. The situation in a juvenile court however has always been quite different, in that the juvenile court possessed the necessary jurisdiction to adjudicate the felony charges against the Respondent, Lewis, on their merits.

A recent decision of the Supreme Court of Virginia has held that jeopardy now attaches when a court not of record in a preliminary hearing convicts the accused of a lesser included misdemeanor offense, and that such a conviction is a bar to any further prosecution of the original felony charge. *Rouzie v. Commonwealth,* 215 Va. 174 (1974). In addressing an argument similar to one proposed by petitioner the Court at 179 said:

> "Before concluding, we notice a final argument advanced by the Commonwealth: where the Commonwealth seeks at a preliminary hearing to show only probable cause of a felony, it would be 'inequitable' to permit a conviction of a lesser included misdemeanor to bar subsequent prosecution of the felony. The ready answer to this argument is that any equity involved in a double jeopardy plea inures to the benefit of the accused."

The concept of double jeopardy is one deeply rooted in our history. It can be traced back at least as far as the Greek and Roman Empires, where it found expression in both the Digest of Justinian and the Canon Law of the Roman Empire. See, Jay A. Sigler "A History of Double Jeopardy", 7 *Amer. Jour. Legal History* 283 (1963)

This Honorable Court has defined the scope of the protection on numerous occasions: *Ex Parte Lange*, 18 Wall (85 U. S.) 163 (1874); *Green v. United States*, 355 U. S. 184 (1957); *Benton v. Maryland*, 395 U. S. 784 (1969); *Ashe v. Swenson*, 397 U. S. 436 (1970) and *United States v. Jorn*, 400 U. S. 470 (1971). Your Honors have ruled that a defendent is placed in jeopardy once he is "put to trial before the trier of facts, whether the trier be a jury or a judge." *United States v. Jorn* supra at 479.

This Court has not yet decided whether double jeopardy protections apply to juvenile courts, but the trend of recent decisions of inferior courts that have considered the question is strongly in favor of application. *Collins v. State*, (Tex. Cir. App.) 429 S. W. 2d 650 (1968); *Anonymous v. Superior Court of Pima*, 10 Ariz. App. 253, 457 P. 2d 956 (1969); *Tolliver v. Judges of Family Court*, 298 N. Y. S. 2d 237 (1969); *Richard M. v. Superior Court of Shasta Co.*, 4 Cal. 3rd 370, 482 P. 2d 664 (1971); *State v. Gibbs*, 94 Ida. 108, 500 P. 2d ---- 503 S. W. 2d 185 (1973); *Tennessee v. Jackson and Avery*, ---- Tenn. ---- 503 S. W. 2d 185 (1973); *Fain v. Duff*, 488 F 2d 218 (5th Cir. 1973) and *Jones v. Breed*, 497 F 2d 1160 (9th Cir. 1974), *cert. granted* No. 73-1995.

The petitioners attempt to characterize juvenile proceedings as protective and not penal, civil and not criminal to support the proposition that double jeopardy protections do not apply to juvenile proceedings. However, this Honorable Court on several occasions has stated that due process rights cannot be denied under the guise of semantic labelings.

*In re Gault*, 387 U. S. 1 (1967), this Court held that the mere labeling of a juvenile proceeding as "civil" rather than "crim-

inal" could not be used as a rationale without more, for denying due process rights of children. Three years later in *In Re Winship,* 397 v.s. 358 (1970). This court made it clear that the language in *Gault* that juvenile proceedings to determine delinquency "must be regarded as 'criminal' for purposes of the privilege against self-incrimination," 387 U.S. at 49, "stood for a general condemnation of any deprivation of any due process right if based merely on the simplistic argument that juvenile proceedings are "civil" and that a charge of delinquency is not a "crime." The Supreme Court of Tennessee in *State v. Jackson,* supra held that under the mandate of *In re Gault, supra,* the state of Tennessee could no longer hold that the double jeopardy protections do not apply to juvenile proceedings because they are civil in nature and not criminal or penal.

The clear pattern that emerges from these recent decisions is that one must look beyond euphemisms to the substance of the juvenile proceeding. Attaching importance to labels such as "civil" and "criminal" has been roundly condemned as a superficial and inadequate means of determining what constitutional protections are due. Whatever the label, the juvenile adjudicatory hearing is plainly a full fact-finding process, no different in that respect from the adult criminal trial.

The United States Court of Appeals for the Fourth, Fifth and Ninth Circuits have recently held that the double jeopardy provisions of the Fifth Amendment apply to juvenile proceedings. See: *Fain v. Duff,* supra; *Jones v. Breed,* supra and *Howard v. Lewis* (4th Cir. November 4, 1974).

The respondent was tried, convicted and sentenced within the context of the juvenile court proceedings, and to try him again as an adult is a classic case of a violation of his rights under the Fifth Amendment not to be placed in jeopardy twice for the same offense. The decision of The United States Court Of Appeals For The Fourth Circuit should not be disturbed and the petition for a writ of certiorari should be denied.

## II.

**The Respondent Nelson James Lewis, Having Exhausted The Remedies Available To Him In The State Courts Of Virginia Was Properly Awarded A Writ Of Habeas Corpus From The United States District Court For The Western District Of Virginia.**

In order to be entitled to a writ of habeas corpus, a petitioner must meet certain requirements. First, he must be in custody in violation of the Constitution or laws or treaties of the United States. See 28 United States, Code Section 2241 (c) (3). The respondent was at the time of the filing of the writ in the custody of the Virginia Department Of Corrections. He had also alleged in his petition that he was being detained in violation of the Fifth and Fourteenth Amendments of the United States Constitution.

In addition to the aforesaid criteria, a petitioner must show that he has exhausted the remedies available in the Courts of the state, or that there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner. See 28 United States Code Section 2254 (h).

The Honorable District Court Judge in his opinion, (p. 2), specifically found that the respondent, Nelson James Lewis, had exhausted his state remedies by having presented his claim to the Supreme Court Of Virginia. Therefore, the criteria for being awarded a writ of habeas corpus has been met by the respondent. The Commonwealth in its petition asserts that the District Court and The Court Of Appeals had to specifically find that the state court procedures for hearing federal constitutional claims were inadequate before a writ could issue from the Court. Such an assertation is not supportable by the federal habeas corpus statutes nor by any citations to relevant court decisions.

## CONCLUSION

For the aforementioned reasons it is respectfully submitted that the Writ of Certiorari should not be granted, and that the order of The United States Court Of Appeals For The Fourth Circuit should be continued in full force and effect.

Respectfully submitted,

L. B. CHANDLER, JR.
Counsel for Respondent
Nelson James Lewis

415 Park Street
Charlottesville, Virginia 22901

## CERTIFICATE OF SERVICE

I, L. B. Chandler, Jr., Counsel for the respondent Nelson James Lewis, in the captioned matter and a member of the bar of the Supreme Court Of The United States, do hereby certify the on the 10th day of January, 1975, I mailed a copy of the foregoing Brief In Opposition to a Petition for a Writ of Certiorari to the judgement of the United States Court of Appeals for the Fourth Circuit by first class mail to Robert E. Shepherd, Jr. Assistant Attorney General Of Virginia, Supreme Court-State Library Building, Richmond, Virginia, 23219, Counsel for the petitioners herein.

L. B. CHANDLER, JR.